

REMARKS

Reconsideration of the application is requested. Claims 36-59 remain in the application.

In the second paragraph on page 1 of the above-identified Office action, claims 36-59 have been rejected as being obvious over Kim, U.S. Patent No. 4,442,132 (hereinafter, Kim '132) in view of Japanese Patent Application Publication No. JP401312960A to Kondo (hereinafter, Kondo '960) under 35 U.S.C. § 103(a). As will be explained below, it is believed that the claims were patentable over the cited art in their original form and, therefore, the claims have not been amended to overcome the references.

Before discussing the prior art in detail, it is believed that a brief review of the invention as claimed, would be helpful. Claim 36 calls for, *inter alia*, a baking mixture having the following features:

flours and/or starches, the proportion of flours and/or starches being at least 63.8 percent by weight of said mixture excluding water, and

a plasticizing amount of a plasticizing agent selected from the group consisting of erythritol, xylitol, mixtures of erythritol and xylitol, mixtures of erythritol and sugar, mixtures of xylitol and sugar, and mixtures of erythritol, xylitol, and sugar. (Emphasis added by Applicants.)

Applicants have distilled the Examiner's arguments from the final Office action dated May 27, 2005, into two concise statements. Applicants will address these statements in the response. The arguments were as follows:

- "None of the claims specifically claim a flour/starch content that differs from Kondo." (Page 1, lines 18-19)
- "Applicant has not established criticality to the amounts claimed." (Page 2, line 14)

To address these comments, the remainder of the response will focus on two discussions:

- Examination of the flour and/or starch proportions in the Kim '132 and Kondo '960
- A more detailed explanation of what happens if the products according to the invention have flour and/or starch proportions outside the claimed limits (i.e. criticality of the claimed range).

Examination of the flour and/or starch proportions in Kim '132 and Kondo '960

A translation of Kondo '960 teaches two examples.

Example 1 teaches a recipe for sponge cake. The flour and/or starch percentages that are taught are 32.6% and 32.8%. In contrast, the baking mixture of the instant application calls for a minimum flour and/or starch content of 63.8%

Example 2 teaches a cookie. The flour and/or starch percentage is 42.9% and 45.0%. In contrast, the baking mixture of the instant application calls for a minimum flour and/or starch content of 63.8%. Furthermore, Example 2 teaches to include 17 parts of fat.

Applicants are convinced that the examples taught by Kondo '960 will never work in any of the manufacturing equipment that they have used while practicing the invention of the instant application.

In addition, with regard to Example 1 (the sponge cake), the level of sweeteners (polyol plus sugar) is so high that no processable intermediate product would be made.

With regard to Example 2 (the cookie composition), both the level of sweeteners (polyol plus sugar) and the fat level in the recipe far exceed the usual range for manufacturing hot heat-deformable crunchy wafer products. From their

experience, Applicants have discovered that, for hot heat-deformable crunch wafer products, the fat level must be far less than 10%.

Kim '132 teaches that the flour and starch proportions are even much lower, even if all of the flour substitutes (as according to claim 3 of Kim '132) are included within the "flour and/or starch proportions of all ingredients except water":

Example No.	Flour plus flour substitutes (%)
Example 1	17.9
Example 2	3.0
Example 3	22.0

The teachings of Kondo '960 and Kim '132 involve sweetener-replaced cakes and cookies. In contrast, the invention of the instant application involves hot heat-deformable products; see the examples in the specification for manufacturing crunchy wafers such as wafer rolls (i.e. wafer sticks and wafer flutes), sugar wafer cones, deep-formed wafer bowls, and wafer sugar rolls.

Effects on the Products According To the Invention If the
Flours and/Or Starch Proportions Are Below the Claimed Limit

The effects on the products according to the invention can be explained through the example of wafer rolls (i.e. wafer

flutes) with sugar replacement. Examples 1-16 of the instant application were altered to the levels of starch and/or sugar suggested by the prior art and even lower levels.

For Examples 8 and 16, which are at the lower flour and/or starches proportion limit claimed (i.e. 63.82%), the product already has a remark "c", which indicates that the intermediate wafer strap after baking is "soft". If the flours and/or starches proportion were further lowered for example to 64.01%, the resulting product no longer has sufficient manufacturing stability. Due to the increased softness of the freshly baked and still hot wafer band, the tearing force needed to release that wafer band from the baking surface will frequently cause rupturing of the wafer band.

The claimed limit of 63.8% for these examples also clearly demonstrates the unexpected additional "plasticizing" effect of using the polyols erythritol and xylitol. Without replacing the sucrose, the "flours and/or starch proportions" must be much lower compared to the recipes according to the invention. Example 1, which was added for comparison, is a conventional wafer product, just with sucrose and without any polyol addition. That comparison example has a flour and/or starch proportion of merely 59.08%.

Accordingly, the same negative "softness effect" applies to the other wafer product types disclosed in the instant application if the flour and/or starch proportion falls below the lower limits given in the respective group of examples.

Clearly, Kim '132 in view of Kondo '960 does not show a baking mixture having flours and/or starches of at least 63.8 percent by weight as recited in claim 36 of the instant application.

It is accordingly believed to be clear that none of the references, whether taken alone or in any combination, either show or suggest the features of claim 36. Claim 36 is, therefore, believed to be patentable over the art. The remaining claims are believed to be patentable as well because they all are ultimately dependent on claim 36 or contain similar patentable features.

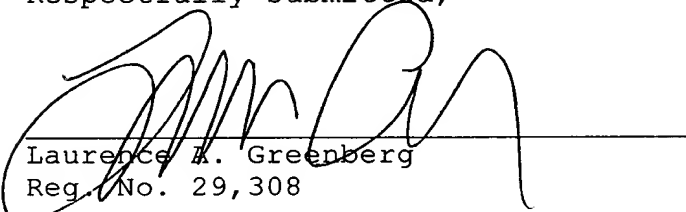
In view of the foregoing, reconsideration and allowance of claims 36-59 are solicited. In the event the Examiner should still find any of the claims to be unpatentable, counsel would appreciate receiving a telephone call so that, if possible, patentable language can be worked out.

Appl. No. 09/768,394
Amdt. Dated 11/28/2005
Reply to Office action of 5/27/2005

Petition for extension is herewith made. The extension fee for response within a period of three months pursuant to Section 1.136(a) in the amount of \$1,020.00 in accordance with Section 1.17 is enclosed herewith.

Please charge any other fees that might be due with respect to Sections 1.16 and 1.17 to the Deposit Account of Lerner and Greenberg, P.A., No. 12-1099.

Respectfully submitted,



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